



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 23, 1998

Mr. Paul Sarahan  
Director-Legal, Litigation Division  
TNRCC  
P.O. Box 13087  
Austin, Texas 78011-3087

OR98-2475

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 118971.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information relating to Huntsman Petrochemical Corporation's Port Arthur Facility ("Huntsman"). You state that you have released some of the requested information. However, you claim that the remaining information is excepted from disclosure by sections 552.103, 552.107, 552.108, 552.110 and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and have reviewed the sample documents you have submitted.<sup>2</sup>

Initially, you argue that section 552.108 excepts Attachment C from public disclosure. Section 552.108, the "law enforcement exception," provides in relevant part as follows:

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<sup>1</sup>You have received authorization from Huntsman to release certain requested information. Consequently, you have withdrawn your section 552.110 claim.

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if: (1) release of the information would interfere with the detection, investigation or prosecution of crime[.]

This office has held that records of criminal investigations conducted by governmental agencies may be withheld from disclosure under limited circumstances. For example, records that otherwise qualify for the section 552.108 exception, such as documentary evidence in a police file on a pending case, do not necessarily lose that status while in the custody of an agency not directly involved with law enforcement. Open Records Decision No. 272 at 1-2 (1981). Similarly, in construing the statutory predecessor to section 552.108, this office concluded that if an investigation by an administrative agency reveals possible criminal conduct that the agency intends to report or already has reported to the appropriate law enforcement agency, then section 552.108 will apply to the information gathered by the administrative agency if its release would unduly interfere with law enforcement. Open Records Decision No. 493 at 2 (1988) (construing predecessor statute).

You explain that the documents in Attachment C are related to a criminal investigation conducted by the Special Investigation Section of the commission in conjunction with the United States Attorney's Office. You further explain that this investigation may lead to a criminal indictment in federal court. As the proper custodian of the information, you have invoked section 552.108 and shown that release of the requested information would interfere with the detection, investigation or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); *see also* Open Records Decision No. 493 (1988). Therefore, we conclude that Attachment C may be withheld under section 552.108(a)(1).

Next, you argue that Attachment E may be withheld under section 552.103 because of a pending enforcement action. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that there is currently an enforcement action pending against Huntsman which may only be resolved through settlement, administrative hearing, or trial. We have reviewed the representative documents for which the commission has asserted section 552.103(a) based on the enforcement action. We conclude that they are related to the pending

enforcement action against Huntsman. Therefore, the commission may withhold Attachment E under section 552.103(a).

We note, however, that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

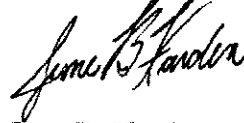
You also argue that the documents in Attachment F may be withheld under the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We agree that most of the information you have marked may be withheld pursuant to section 552.107(1) of the Government Code. We have marked the document that must be released.

Lastly, you argue that the documents in Attachment G are excepted from disclosure under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Furthermore, in Open Records Decision 559 (1990), this office concluded that a preliminary draft of a document that is intended for public release in final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document and as such could be withheld pursuant to the statutory predecessor to section 552.111. Thus, section 552.111 also excepts draft documents to the extent that the draft documents pertain to the policymaking function of the governmental body. After careful review, we agree that the documents in Attachment G may be withheld under section 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts

presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "June B. Harden". The signature is fluid and cursive, with the first name "June" and last name "Harden" clearly distinguishable.

June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/cbh

Ref.: ID#118971

Enclosures: Submitted documents

cc: Mr. George T. Shipley  
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(w/o enclosures)